A

KE KA TONG SDN BHD

v.

DATUK BANDAR KUALA LUMPUR

B

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: W-02-493-1998]

C

22 JANUARY 2008

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Order for sale - Legislative intention - Whether ss. 148 and 151 Local Government Act 1976 must be read together - Local Government Act 1976, ss. 148(2), 151*

D

STATUTORY INTERPRETATION: *Construction of statutes - Statute must be looked at as a whole - Whether ss. 148 and 151 Local Government Act 1976 must be read together to ascertain legislative intention - Local Government Act 1976, ss. 148(2), 151*

E

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Order for sale - Scope of - Local Government Act 1976, s. 151*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Order*

F

for sale - Failure by respondent to file affidavit in reply to appellant's affidavits - Whether could be assumed to be respondent's admission of averments in appellant's affidavits

WORDS & PHRASES: *'may' - Local Government Act 1976, s. 148 - Interpretation - Whether directory or mandatory - Intention of legislature*

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This was an appeal by the appellant against the decision of the High Court refusing to set aside its earlier default order allowing the respondent to auction four parcels of land belonging to the appellant, who failed to settle assessment taxes, warrant penalties

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plus interest at the rate of 6% per annum from 1 October 1994 until full payment with costs. It was also in the earlier order that the balance of the sale proceeds of the auction would be paid to relevant parties in accordance with s. 151(3) of the Local Government Act 1976 ('Act'). The substantive part of this appeal

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concerned the appellant's contention that the High Court judge erred in not reading together ss. 148 and 151 of the Act in order to determine the intention of the legislature. By interpreting the

word 'may' as found in s. 148 of the Act as being merely directory rather than mandatory, the High Court judge failed to consider the implication arising from the opening words in s. 151 of the Act.

Held (allowing the appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

(1) In view of the words used in ss. 148 and 151 of the Act, the two sections should be read together if the intention of the legislature is to be given any effect. It is for the local authority to show that it has exhausted all the mechanisms as provided for in s. 148 of the Act, including the service of Form H given under the proviso of subs. (2) of s. 148, when making an application under s. 151 of the Act. Contrary to what was contended before this court, ss. 148 or 151 does not impose upon the appellant or the debtors of the local authority the duty to ensure that the local authority has done all that is required to be done under s. 148 of the Act. That is not to say that the local authority is not entitled to rely on other avenues to recover the arrears other than s. 148 of the Act. That explains the use of the word 'may' in s. 148. However, if it is inclined to rely on s. 151 of the Act, then the provisions of s. 148 must first be observed. In this instance, the learned High Court judge erred when she ruled that s. 148 did not apply in this case. For the foregoing reason alone, the appeal should be allowed. (paras 7, 11, 12 & 13)

(2) The appellant also submitted that it was wrong to order the sale of all the four pieces of land in one order when the arrears varies and relates to different pieces of land. There was no merit to this argument since s. 151 of the Act does not limit the scope of an order that may be made by the Registrar of the High Court. It is permissible 'to order the attachment and sale of the holding or holdings in respect of which the arrear has accrued'. (paras 15 & 16)

(3) On an issue that the respondent failed to file an affidavit in reply to the affidavits filed by the appellant, the learned High Court judge erred when she allowed the use of an affidavit related to an earlier application which had been struck out. Even if it could be done, there should have been at least a notice taken by the respondent expressing its intention to use the same. Without any affidavit in reply, it could be assumed

that the respondent had admitted the averments in the affidavits filed by the appellant. *Ipso facto* the application by the appellant to set aside the earlier order should have been allowed. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana enggan mengenepikan perintah keingkarannya yang terdahulu yang membenarkan responden melelong empat bidang tanah milik perayu, yang gagal membayar cukai taksiran, penalti waran dan faedah pada kadar 6% setahun bermula 1 Oktober 1994 sehingga pembayaran sepenuhnya dengan kos. Juga menjadi intipati perintah terdahulu bahawa baki dari penjualan lelong akan dibayar kepada pihak-pihak yang relevan selaras dengan s. 151(3) Akta Kerajaan Tempatan 1976 ('Akta'). Secara substantifnya rayuan di sini adalah mengenai hujah perayu bahawa hakim Mahkamah Tinggi telah khilaf kerana tidak membaca secara bersama ss. 148 dan 151 Akta bagi menentukan niat badan perundangan. Dengan mentafsir perkataan 'boleh' yang terdapat pada s. 148 Akta sebagai bersifat arahan semata-mata dan tidak mandatori, hakim Mahkamah Tinggi dikatakan gagal menimbang implikasi yang timbul dari ungkapan pembukaan s. 151 Akta.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

(1) Mengambilkira perkataan yang digunakan di dalam ss. 148 dan 151 Akta, kedua-dua seksyen harus dibaca bersekali jika niat badan perundangan hendak diberikan kesannya. Menjadi tanggungjawab pihakberkuasa tempatan untuk menunjukkan bahawa ia telah menggunakan segala mekanisma seperti yang diperuntukkan oleh s. 148 Akta, termasuk penyerahan Borang H yang diberi di bawah proviso kepada seksyen kecil (2) s. 148, bilamana membuat permohonan di bawah s. 151 Akta. Bertentangan dengan apa yang dihujahkan di mahkamah ini, ss. 148 atau 151 tidak meletakkan beban ke atas perayu atau penghutang-penghutang pihakberkuasa tempatan untuk mempastikan bahawa pihakberkuasa tempatan telah melakukan segala yang perlu dilakukan di bawah s. 148 Akta. Ini bukan bermakna bahawa pihakberkuasa tempatan tidak boleh bergantung kepada cara-cara lain bagi mendapatkan kembali tunggakan selain dari s. 148 Akta. Ini sekaligus menjelaskan penggunaan perkataan 'boleh' di dalam in s. 148. Bagaimanapun,

jika ia cenderung untuk bergantung kepada s. 151 Akta, maka peruntukan s. 148 hendaklah terlebih dahulu dipatuhi. Dalam kes di sini, yang arif hakim Mahkamah Tinggi khilaf bilamana beliau memutuskan bahawa s. 148 tidak terpakai kepada kes ini. Atas alasan ini sahaja, rayuan harus dibenarkan.

(2) Perayu juga berhujah bahawa adalah salah untuk memerintahkan penjualan keempat-empat bidang tanah dalam satu perintah sedangkan tunggakan-tunggakan adalah berbeza dan berkaitan tanah-tanah yang berbeza. Tiada merit pada hujah ini kerana s. 151 Akta tidak menghadkan skop sesuatu perintah yang boleh dibuat oleh Pendaftar Mahkamah Tinggi. Tiada salahnya 'memerintahkan penahanan dan penjualan harta atau harta-harta berhubung mana tunggakan-tunggakan telah berbangkit'.

(3) Berhubung isu bahawa responden gagal memfailkan afidavit jawapan terhadap afidavit-afidavit yang difailkan oleh perayu, yang arif hakim Mahkamah Tinggi khilaf bilamana beliau membenarkan penggunaan satu afidavit yang berkaitan dengan permohonan terdahulu yang telah pun dibatalkan. Jikapun ia boleh dilakukan, satu notis sepatutnya diberi oleh responden menyatakan niatnya untuk menggunakan afidavit tersebut. Tanpa afidavit jawapan, andaian boleh dibuat bahawa responden telah mengakui pengataan-pengataan di dalam afidavit-afidavit yang difailkan oleh perayu. *Ipso facto* permohonan perayu untuk mengenepikan perintah terdahulu harus dibenarkan.

Case(s) referred to:
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem, Pulau Pinang [1998] 1 CLJ Supp 126 HC ***(refd)***

Legislation referred to:
Local Goveernment Act 1976, ss. 148(2), 151(3)
Rules of the Court of Appeal 1994, r. 102

For the appellant - Dato' Bastian Vendargon; M/s Jayaraman, Ong & Co
For the respondent - Karida Ramli; M/s Samat Din & Partners

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S4-24-1064-94]

Reported by Suresh Nathan

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JUDGMENT

Richard Malanjum JCA:

[1] This is an appeal against the decision made by the High Court on 16 July 1998 refusing to set aside its earlier order made on 13 March 1995. The earlier order was a default order which allowed the respondent to auction four parcels of land along Jalan Stonor Kuala Lumpur belonging to the appellant who failed to settle assessments taxes, warrant penalties plus interest at the rate of 6% per annum from 1 October 1994 until full payment with costs. It was also in the earlier order that the balance of the sale proceeds of the auction would be paid to the relevant parties in accordance with s. 151(3) of the Local Government Act 1976.

[2] In its application to set aside the earlier order the appellant relied on several grounds, both technical and substantially on the interpretation of ss. 148 and 151 of the Local Government Act 1976. None of the grounds persuaded the learned High Court Judge. At the same time the learned High Court Judge allowed the recitals in the earlier order to be rectified on the application by the respondent.

[3] Before us the appellant relied on the same issues as canvassed before the High Court. While resisting the appeal the respondent also raised a preliminary objection at the outset of the hearing.

[4] After hearing the arguments on the preliminary objection we dismissed it. We do not think it has any merit. The errors referred to were typographical errors. In any event it was not shown to us that the respondent suffered injustice and prejudice as a result of such errors or non-compliance to the Rules of the Court of Appeal. Further, we bear in mind r. 102 of the Rules of the Court of Appeal which provides that 'non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or judge shall so direct, but such proceeding may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit'.

[5] On the appeal proper learned counsel for the appellant complained that the learned High Court Judge went beyond her role in an adversarial system by investigating the error in the earlier order when it should be the obligation of the respondent to make

the necessary application to rectify the error. With respect we do not think there is any merit in this complaint. In any event the respondent did make an application *albeit* subsequently.

[6] Next, learned counsel for the appellant contended that the learned High Court Judge erred in not reading together ss. 148 and 151 of the Local Government Act in order to determine the intention of the legislature. By attributing to the word 'may' as found in s. 148 as merely directory rather than mandatory, the learned High Court Judge failed to consider the implication arising from the opening words in s. 151.

[7] We have considered this argument and with respect to the learned High Court Judge we think there is valid basis for it. In view of the words used in the sections we are of the opinion that the two sections should be read together if the intention of the Legislature is to be given any effect.

[8] Indeed 'in the deliberation to ascertain legislative intention, the court has to be mindful that the Act, taken as a whole and the general object intended to be secured by the Act, as viewed from the context of the particular provision involved, has to be considered and if such provision has a proviso, both the provision and the proviso are to be read in such a manner that they mutually throw light on each other and result in a harmonious construction'. (See: *Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem, Pulau Pinang* [1998] 1 CLJ Supp 126).

[9] Reverting to the appeal at hand no doubt s. 148 begins with this phrase:

> For the recovery of an arrear the local authority may issue a warrant of attachment in Form F ... .

[10] However, the opening words of s. 151 makes it imperative to find that it is the intention of the Legislature to require the local authority to first exhaust the mechanisms as provided in s. 148 for the recovery of arrears outstanding due to it. The opening words read:

> If the arrear cannot be recovered in the manner provided in section 148 it shall be lawful for the Registrar of the High Court upon application made by the local authority, ...

[11] In other words it is for the local authority to show that it has exhausted all the mechanisms as provided for in s. 148 including the service of Form H given under the proviso of subsection (2) of s. 148 when making an application under s. 151.

[12] Contrary to what was contended before us we do not think s. 148 or s. 151 imposes upon the appellant or debtors of the local authority the duty to ensure that the local authority has done all that is required to be done under s. 148.

[13] Meanwhile, we are not saying that the local authority is not entitled to rely on other avenues to recover the arrears other than s. 148. That explains the use of the word 'may' in s. 148. However, if it is inclined to rely on s. 151 then the provisions of s. 148 must be first observed. With respect we think the learned High Court Judge erred when she ruled that s. 148 did not apply in this case.

[14] For the foregoing reason alone that we should allow the appeal.

[15] Learned counsel for the appellant also submitted that it was wrong to order the sale of all the four pieces of land in one order when the arrears varies and relates to different pieces of land.

[16] We find no merit in the argument. Section 151 does not limit the scope of an order that may be made by the Registrar of the High Court. It is permissible 'to order the attachment and sale of the holding or holdings in respect of which the arrear has accrued'.

[17] On the issue that the respondent failed to file any affidavit in reply to the affidavits filed by the appellant we are in agreement with learned counsel for the appellant that the learned High Court Judge erred when she allowed the use of an affidavit related to an earlier application which had been struck out. Even if it could be done at least there should have been a notice taken by the respondent expressing its intention to use the same. Without any affidavit in reply it could be assumed that the respondent had admitted the averments in the affidavits filed by the appellant. (See: *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 CLJ 609). *Ipso facto* the application by the appellant to set aside the earlier order should have been allowed.

[18] For the above reasons we allowed the appeal by the appellant with costs.